IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO. 310 OF 2003

IN

SUMMARY SUIT NO. 472 OF 2003

Manoj Manilal Gala .. Plaintiff

versus

Mermaid Exports & ors. .. Defendants

...

Mr.N.C. Parikh i/b M.Hiralal for the plaintiff.

Mr.Sanjay Jain i/b Ramesh Jain for the defendants.

CORAM : D.G. KARNIK, J

DATED : 21st February 2005.

P.C.:

1. The plaintiff has filed this suit for recovery of the value of the goods sold, supplied and delivered to the defendant under seven different invoices bearing Invoice nos.5 to 11 mentioned in paragraph no.2 of the plaint. So far as invoice nos.5 to 9 are concerned, the defendant admits

receipt of the goods as well as the receipt of the invoices. However, so far as invoice nos.10 and 11 are concerned, the defendant has denied receipt of the goods as well as the invoices. According to the defendant, he is liable to pay only the price of the goods for invoice nos.5 to 9 and not in respect of the invoice nos.10 and 11.

2. Out of the total amount of Rs.11,00,000/- for invoice nos.5 to 11, the value of the goods supplied under invoice nos.5 to 9 comes to Rs.7,77,556/-. The value of the goods covered under invoice nos.10 and 11 which are disputed is Rs.3,22,444/-. The learned counsel for the plaintiff relies upon a letter dated 5th April 2000 (Exhibit-H to the plaint) wherein the defendant has stated that he has paid Rs.4,15,000/- and after assessment has agreed to pay balance of Rs.6,55,835/-. By filing an affidavit in reply, the defendant has denied having written any such letter and has also denied the signature on the letter. In the circumstances, at this stage, the plaintiff cannot rely upon the said letter until letter and signature below the letter are proved by him.

3. The learned counsel for the plaintiff also invites my attention to his further affidavit dated

22nd September 2004 in which he has referred to and relied upon certain messages sent as SMS on the mobile phone. This affidavit in rejoinder was filed long after the defendant filed his affidavit in reply. Assuming that some SMS were exchanged between the parties cannot be said to be an admission of liability at this stage.

4. The defence of the defendant is that he has not received the goods under the two invoices. The plaintiff would therefore be required to establish and prove the delivery of the goods under the last two invoices i.e. Invoice nos.10 and 11 until that the defence of the defendant cannot to be said to be sham and illusory. If the contention of the defendant is accepted that the goods under invoice nos.10 and 11 have not been received, then admittedly, no amount is presently due and payable by the defendant to the plaintiff.

5. Hence, defendant is granted unconditional leave to the defendant to defend the suit. Suit shall stand transferred to the list of commercial causes. The defendant to file written statement within a period of four weeks.

D.G. KARNIK, J